78-101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

ROBERT D. ROBERTS,
Appellee and Respondent,

vs.

BETTY J. ROBERTS,
Appellant and Petitioner.

APPEAL FROM, AND PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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Comes now the Appellant and Petitioner, Betty J. Roberts and respectfully appeals from and prays that a writ of certiorari issue to the Supreme Court of Nebraska to review the judgment and opinion of the Supreme Court of Nebraska entered in this proceeding on March 8, 1978. Rehearing was denied by said Supreme Court of Nebraska on April 24, 1978.

OPINION BELOW

The judgment and opinion of the Supreme Court of

Nebraska appears in 200 Neb. 256, ____ N. W. 2d ____, and a copy thereof appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the Supreme Court of Nebraska was entered on March 8, 1978. A petition for rehearing was timely filed on March 27, 1978. Rehearing was denied by the Supreme Court of Nebraska on April 24, 1978. This Court's jurisdiction is invoked under 28 U. S. Code § 1257 (2) as to the appeal and under § 1257 (3) as to the petition for writ of certiorari.

QUESTIONS PRESENTED

1. Whether Nebraska's "no-fault" divorce statute impairs an obligation of contract in violation of Art. 1, Sec. 10, Clause 1, U. S. Constitution, as applied to appellant/petitioner wife, where not only the *remedy* but the basic *substantive rights* under the marital contract were dealt with and terminated *without breach by the wife,* where the Supreme Court of Nebraska approved a dissolution of marriage requested only by the husband but based solely on his own meretricious relationship with his paramour with whom he lived in full view of the court during the pendency of the divorce proceedings over the objections of the wife, where the court refused to interfere with the husband living with the paramour for purposes of conciliation proceedings, and where the husband merely claimed he no longer loved his wife of 22 years.

2. Whether Nebraska's "no-fault" divorce statute deprives appellant/petitioner wife, under color of state law, of a right, privilege or immunity secured by the

United States Constitution, without due process of law, as applied to appellant/petitioner wife, where not only the *remedy* but the basic *substantive rights* under the marital contract were dealt with and terminated *without breach by the wife,* where the Supreme Court of Nebraska approved a dissolution of marriage requested only by the husband but based solely on his own meretricious relationship with his paramour with whom he lived in full view of the court during the pendency of the divorce proceedings over the objections of the wife, where the court refused to interfere with the husband living with the paramour for purposes of conciliation proceedings, and where the husband merely claimed he no longer loved his wife of 22 years.

STATUTORY PROVISIONS INVOLVED

The Nebraska "no-fault" divorce law, originally enacted in 1972 is contained in §§ 42-347 to 379 of the Revised Statutes of Nebraska, and pertinent provisions are set forth in the Appendix hereto.

STATEMENT OF THE CASE

On April 24, 1978, the Supreme Court of Nebraska denied a motion by appellant for rehearing of the judgment and decision of the Supreme Court of Nebraska filed on March 8, 1978, denying an appeal by the respondent wife from the District Court of Lancaster County dissolving the marriage between Robert D. Roberts, petitioner and Betty J. Roberts, respondent.

On July 20, 1976, petitioner husband, Robert D. Roberts, filed a petition for dissolution of marriage, (T3) to which respondent wife, Betty J. Roberts, filed an an-

swer and cross-petition for legal separation on August 4, 1976, denying under oath that the marriage was irretrievably broken and alleging in paragraph 6 of the cross-petition that in time the petitioner husband will come to his senses and regret separating himself from his wife and that there is and will be a basis for a marriage and that the marriage should not be dissolved (T5). On January 6, 1977, petitioner husband made a reply to the cross-petition, denying paragraph 6 and alleged that all efforts had been made to resolve the marriage and that any continued efforts toward such reconciliation are futile (T8).

The parties were married on July 3, 1954 in Lincoln, Lancaster County, Nebraska and there was one child born of that marriage who has reached his majority.

The husband, by the evidence, first met a certain Betty LaPierre several years prior to the trial. He moved into her residence "about a year" prior to the trial, according to Mrs. LaPierre, and also according to Mrs. LaPierre had a joint checking account with Mrs. LaPierre for "about a year". Living there also were Mrs. LaPierre's 16 year old daughter and the daughter's father to whom Mrs. LaPierre was never married and as to whom the petitioner husband stated "I don't believe he is normal like he was before his operation," and who was receiving social security payments. The petitioner husband paid no rent, according to him and to Mrs. LaPierre, claiming that he could not afford another residence because of his bills, yet after being requested by the respondent wife to sell a recreational cabin which the husband said was worth $7,500 the bills which did not amount to $7,500 could have been paid.

The wife repeatedly asked the husband to move out of the residence of Mrs. LaPierre but the husband refused. Several of these conferences were in the presence of Mrs. LaPierre at the residence of Mrs. LaPierre.

The wife testified that since his involvement with Mrs. LaPierre the husband had changed in many ways, not caring about his appearance, nor that of his home or his vehicles of which he had always been proud and taken good care of in the past. He had also commenced drinking. In November, 1975, he returned to the wife briefly, being very remorseful, but again went to live with Mrs. LaPierre.

Prior to the husband filing for dissolution of marriage, by a petition signed in December, 1975 (after he went back to live with Mrs. LaPierre) but not filed until July, 1976, there was a petition for conciliation filed in conciliation court which resulted in two visits jointly with a counselor and eventual dismissal of the conciliation petition. During the pendency of the conciliation proceedings the husband was continuously living with Betty LaPierre. The wife has repeatedly contended that no proper chance for conciliation was given because of the influence of Mrs. LaPierre and asked the Court to order the husband to move out of the residence of Mrs. LaPierre and to continue the trial to permit additional attempts at reconciliation without the husband living with Mrs. LaPierre. This request was denied by the court. The trial court sustained objections to questions about the relationship between the petitioner husband and his paramour Betty LaPierre, and had previously refused to require similar questions answered in discovery proceedings prior to trial.

Under § 42-361, R. R. S., Nebr., the procedure for a default dissolution of marriage or a dissolution of marriage desired by both parties is distinguishable in the no-fault law from that of where one party denies that the marriage is irretrievably broken. On the one hand, the court must find that the marriage is irretrievably broken, but may do so without inquiring into all of the relevant facts. But if one of the parties denies that the marriage is irretrievably broken, then the court is required by statute to inquire into all of the relevant factors and the " . . . prospect of reconciliation."

But in this case, such inquiry was cut short by the ruling of the court on the deposition questions and by the court in its rulings during the trial, prohibiting the questions on the relationship of the husband and his paramour.

It was expressly explained to the court that the purpose was to show that the husband was under the spell of the paramour for the purpose of showing that someday such relationship, not being founded on proper basis, would tend to self-destruct, and thereby the husband would have an opportunity to come to his senses and realize his mistake, feel remorse and return to his spouse who loves him so much as to want him back despite this terrible wrong he is doing her. Such mature love and concern for her spouse was rewarded by the trial court with the statement "maybe he wants to be under her spell" (E22:14) and a denial of a court order that the husband and the paramour merely not live together, giving the conciliation process a fair shake which up to that point it utterly had not had.

REASONS FOR GRANTING THE WRIT AND APPEAL

Nebraska's "no-fault" divorce statute impairs an obligation of contract in violation of Art. 1, Sec. 10, Clause 1, U. S. Constitution, as applied to appellant/petitioner wife, where not only the *remedy* but the basic *substantive rights* under the marital contract were dealt with and terminated *without breach by the wife,* where the Supreme Court of Nebraska approved a dissolution of marriage requested only by the husband but based solely on his own meretricious relationship with his paramour with whom he lived in full view of the court during the pendency of the divorce proceedings over the objections of the wife, where the court refused to interfere with the husband living with the paramour for purposes of conciliation proceedings, and where the husband merely claimed he no longer loved his wife of 22 years.

The principles which should be controlling in this case should be taken from the classic, famous impairment of obligation of contract case of *Dartmouth College v. Woodward,* 4 Wheat. 518, 4 L. Ed. 629 (1819). Daniel Webster argued the case and Justice Story had the following to say about no-fault divorces:

> It is, in the first place, contended that it is not a contract within the prohibitory clause of the constitution, because that clause was never intended to apply to mere contracts of civil institutions, such as the contract of marriage, or to grants of power to state officers, or to contracts relative to their offices, or to grants of trust to be exercised for purposes merely public, where the grantees take no beneficial interest. . . .
>
> As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is a matter of

civil institution, I profess not to feel the weight of the reason assigned for the exception. . . . A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law punishing a breach of contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were not longer observed, is in no correct sense a law impairing the obligations of the contract. Could a law, compelling a specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to general laws regulating divorces upon breaches of that contract. But if the argument means to assert that the legislative power to dissolve such a contract, without any breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If under the faith of existing laws a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always in law a valuable consideration for a contract), it is not easy to perceive why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the prohibition as any other contract for a valuable consideration. A man has just as good a right to his wife as to the property acquired under a marriage contract. He has a legal right to her society and her fortune; and to divest such right without his default, and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate.

Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed.

654 (1888) is a case frequently cited in favor of no-fault divorce, since it involved such an outrageous divorce granted by a special act of the legislature without notice to the wife and without her fault and without any cause, justified by Justice Field on the petitio principii basis of "power of the sovereign"! *Maynard v. Hill* as a model of constitutional due process should not only be disapproved, it should be killed and buried forever as a mockery of due process of the most flagrant order. It could be so characterized, that is, were it not for the higher purpose of Justice Field in trying to walk a tightrope so as to not cause crushing consequences to innocent purchasers of the land, children of a second wife who would have been bastardized by voiding the divorce, etc. But here in *Roberts v. Roberts,* we have a situation where there would be no consequences of an adverse nature to any children, purchasers, land titles, etc., except to disappoint an evil scheming paramour of the husband. These cases must at least be separated into two categories (a) those where the divorce was granted and there are now many irreversible consequences therefrom and (b) those where the divorce is still in litigation, such as this one, where there are no pieces to pick up from having granted a divorce. One category could be called "Lazarus" divorces and the latter could be called "Pre-Lazarus" divorces. Only God could put Lazarus back to life, but while Lazarus is alive we should do all we can as humans to keep him alive. Further, the following cases have held that a marriage contract is protected by the Constitutional provision against impairment of contract:

Lawrence v. Miller, 2 N. Y. 245 (1849).

Wesson & Hunting v. Johnson, 66 N. C. 189 (1872) which stated:

> "It impairs the obligation of contract. Marriage is a civil contract, and the rights growing out of it are entitled to the protection of the Constitution of the United States."

Bouknight v. Epting, 11 S. C. 71 (1878).

Atkinson v. Atkinson, 203 N. Y. S. 49, 207 App. Div. 660 (1924), aff'd 203 N. Y. S. 372, 121 Misc. 659 (1923).

See also *Cavanaugh v. Valentine,* 41 N. Y. S. 2d 896, 181 Misc. 48 (1943).

The Nebraska "no-fault" divorce law is a law impairing the obligation of contract of marriages contracted prior to its enactment, as was this marriage of Mr. & Mrs. Roberts, at issue herein. Though there was no written antenuptial agreement, Mr. & Mrs. Roberts' marriage is a contract. The obligations of that contract, whether written or unwritten, may not be impaired by later acts of the legislature. Procedural changes in the divorce laws which change only the remedy for *breach* of the marriage contract are not objectionable, but the Nebraska "no-fault" law does away with the requirement of the *breach* itself and substitutes an entirely new principle which Mrs. Roberts never agreed to when she married Mr. Roberts 22 years before.

2. Nebraska's "no-fault" divorce statutes deprives appellant/petitioner wife, under color of state law, of a right, privilege or immunity secured by the United States Constitution, without due process of law, as applied to appellant/petitioner wife, where not only the *remedy* but the basic *substantive rights* under the marital contract were dealt with and terminated *without breach by the wife,* where the Supreme Court of

Nebraska approved a dissolution of marriage requested only by the husband but based solely on his own meretricious relationship with his paramour with whom he lived in full view of the court during the pendency of the divorce proceedings over the objections of the wife, where the court refused to interfere with the husband living with the paramour for purposes of conciliation proceedings, and where the husband merely claimed he no longer loved his wife of 22 years.

We live in an upside-down, topsy-turvy world if what Judge Burke says is true:

> ". . . it may be true that today's society places greater inviolability around a high school football player's intentions in his selection of a university than it does around the marriage contract . . ." [Quoting from his opinion in *Ewoldt v. Yentes,* Douglas County District Court, Doc. 713, No. 174.]

If a high school football player's intentions are constitutionally protected as being of some value, then it is submitted that a spouse's interest in the marriage contract, merely as a spouse, should have some value which is constitutionally protected.

In Nebraska, as recently as December of 1975, the Supreme Court of Nebraska re-affirmed the tort of criminal conversation in *Breiner v. Olson,* 195 Neb. 120, thus recognizing that the *interest* in a marriage contract is subject to an award of damages for its invasion.

But if the Nebraska no-fault divorce law means that the court, although help is requested, will stand by and do nothing to save a marriage which one spouse, the innocent one, wishes to save while the husband lives

with his paramour in violation of another state law, then state action or inaction by the court is a violation of a constitutionally protected interest of the innocent spouse in protecting her marriage especially where she has *not breached* the marital contract.

If the words " . . . irretrievably broken . . ." mean that a husband is to be left like a hypnotized zombie in the clutches of a scheming paramour while the court fails to act to protect the sanctity and dignity of the marital institution (and the dignity of the court) by ordering the erring spouse and his paramour not to live together during the pendency of proceedings before that court, then the words " . . . irretrievably broken . . ." and " . . . prospect of reconciliation . . ." mean only that no retrieving is even to be attempted (even where there is a clear, continuing, open and defiant violation of state law regarding adultery [cohabitation]).

If that is the interpretation of the no fault legislation then it seems it authorizes divorce "on demand" and any party (including one living with a paramour) can say "I want out" and be given a dissolution of the marriage as a matter of right against an innocent (r.e. "non-breaching") spouse who is trying to save the marriage. The court then becomes a rubber stamp for the unilateral dissolution desires of one of the parties. If that is true, then there is a substantial difference between the terms of the marriage when Mrs. Roberts married Mr. Roberts 22 years ago under a law which had considerably more respect for the institution of marriage than this. If that is true, then there is an impairment of a constitutionally protected interest in a ex post facto manner, which, as stated *supra*, also violates the constitutional restraint against impair-

ment of contract by a state law in violation of Art. 1, Sec. 10, cl.1, U. S. Constitution.

Statutes, such as 28-902 [. . . "If . . . any man shall hereafter . . . desert his wife and cohabit with another woman . . . shall upon conviction thereof be imprisoned in the county jail not exceeding one year."] The Ten Commandments, and social policy dictate that an adulterous relationship should not be rewarded and should not even be tolerated in full view of the Court. The "reward" here is the dissolution of the marriage which was the goal of the "other woman", even though it would be or should be within the power of the Court to withhold this reward as against social policy and if the Court can postpone dissolution of marriages for further consultation it would seem that it could withhold such to require compliance with the statutes of Nebrska prohibiting adulterous living arrangements, particularly as a condition of further conciliation counseling.

Further, despite each person's ego belief that he is the captain of his soul and the master of his destiny, brainwashing is a proven fact and its techniques are becoming more and more understood as being available for use in more contexts than communist prison camps. For example, witness the recent cult cases.

In fact, the brainwashing experience "duplicates" shaping factors already present in all human environment and merely concentrates them like the sun's rays are concentrated by a magnifying glass to produce a flame. Women [especially] and others have known these influences by instinct for centuries.

A comparison of the brainwashing techniques in

communist prison camps or of cults in a "free society" with the influence of the paramour on Mr. Roberts yields direct parallels:

Total enclosure and segregation from family and familiar surroundings	Taking husband into her home
"Love-bombing"	Attention by "other woman"; sympathy, and _____ (restricted by rulings)
Arranging a guilt-producing situation to make it difficult to return to prior environment	Cohabitation and [ditto]
Daily influence; control of needs	Cohabitation and [ditto]
Take-over of affairs	Joint bank account
Long period of such	Since January, 1976 and before
Eventual hunger for *any* companionship	Since January, 1976 and before

Even "deprogramming", recently newsworthy, has comparisons:

Separation from brainwashing milieu	Require such as condition of further proceedings
Lapse of time by itself weakens this control	Prolong such requirement
Consultation regarding the mechanics of such influences	Conciliation and other counselling to explain mechanics of such influences
Insight by victim	Insight by petitioner husband

Further, the adulterous relationship with the "other

woman" is not a proper basis for a lasting relationship and is most likely to self-destruct. Further, if the "other woman" is faced with enough frustration of her schemes, she may give him up.

Frankly, the accepted court procedures for conciliation are somewhat perfunctory and a postcard dismissal of a conciliation petition may not be the final ultimate judgment, particularly where the conciliation was not given a fair chance in view of allowing the husband to cohabit with the "other woman" during the conciliation processing.

See ***McKim v. McKim,*** 6 Cal. 3d 673, 493 P. 2d 868, 871, 100 Cal. Rptr. 140 (1972), in which the Supreme Court of California said:

> Although the Legislature intended that as far as possible dissolution proceedings should be nonadversary, eliminating acrimony, it did not intend that findings of the existence of irreconcilable differences be made perfunctorily.

See also ***Ryan v. Ryan,*** 277 So. 2d 266, 271 (Fla. 1973), in which the Supreme Court of Florida said:

> It is suggested that a circuit judge would hesitate to adjudicate that a marriage is *not* "irretrievably broken" under the present statute when the petitioner simply says that is the fact; that the judge becomes nothing more than a ministerial officer receiving the "irretrievably broken" message and having so received it, being thus compelled to drop this legislative guillotine upon the marriage, thus excising the troublesome mate from the petitioner because the petitioner has subjectively and unilaterally determined that his marriage is irretrievably broken.
>
> We do not view the matter of dissolution as being such a simple, unilateral matter of one mate simply

> saying "I want out." All of the surrounding facts and circumstances are to be inquired into to arrive at the conclusion as to whether or not indeed the marriage has reached the terminal stage based upon facts which must be shown. [Italics in original.]

Even if it be true that the marriage contract is subject to the plenary power of the legislature as to a very important right and interest of the spouse in the marital relationship (*Buchholz v. Buchholz,* 197 Neb. 180 (1976)); nevertheless, the legislature is still subject to the Federal Constitution, and if the plenary power of the legislature operates in an unconstitutional fashion to deprive the spouse of this right, or if the legislative enactment is interpreted by the trial court and the Supreme Court of Nebraska to have this same effect, then there has been an unconstitutional invasion of the spouse's interest, in depriving the spouse of a right without due process under the 14th Amendment. If the unilateral "I want out" request of one spouse who is living with a paramour is met with no attempt by the trial court to at least require conciliation proceedings while the husband lives away from that paramour, then the justification for the state's plenary power is gone and the salt has lost is savor. Also, to exercise plenary power is one thing, but to abdicate that power is another. Such a drastic reversal of treatment of this marital interest, the keystone of our civilization, in a retroactive fashion then does become a deprivation of an important right without due process of law as well as an impairment of contract in violation of the *Constitution,* Art. 1, Sec. 10, cl. 1.

CONCLUSION

Betty J. Roberts prays that her appeal be granted

and further that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Nebraska.

Respectfully submitted,

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APPENDIX "A"

OPINION AND JUDGMENT OF THE SUPREME COURT OF NEBRASKA

1. Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions.

2. When a personal relationship with another under the institution of marriage had deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken.

Heard before White, C. J., Spencer, Boslaugh, McCown, Brodkey, and White, JJ., and Kuns, Retired District Judge.

SPENCER, J.

This is an action for dissolution of marriage. The respondent-wife denied the marriage was irretrievably broken, and cross-petitioned for legal separation. The marriage was dissolved. Respondent appeals, assigning as error the unconstitutionality of sections 42-347 to 42-379, R. R. S. 1943; the marriage was not irretrievably broken; and the court failed to give proper consideration to relevant factors involving that question. We affirm.

The parties married in 1954. Their only child is of legal age. In October 1975, petitioner-husband moved out of the family home and took up residence in the home of a Betty LaPierre. Also living in that home are Mrs. LaPierre's teenage daughter and the father of the daughter, who is not the husband of Mrs. LaPierre. Respondent filed a petition in the conciliation court December 1, 1975. Two conferences were held, but efforts at reconciliation proved to be futile. The petition for dissolution of marriage was filed July 20, 1976, following completion of the proceedings in conciliation court.

Petitioner has at all times insisted the marriage was irretrievably broken. He testified he is not interested

in a reconciliation, and further attempts at counselling would not change his mind. He testified he does not and has not loved his wife for a long period of time.

Respondent alleges petitioner is a changed person since he moved to the LaPierre home. She claims the marriage could be saved if he were removed from the LaPierre influence. This appeal appears to be premised on respondent's contention that the trial court should have delayed action on the petition for divorce until petitioner moved from the LaPierre home.

Whether or not petitioner's relationship is a meretricious one, it should be apparent the marriage is irretrievably broken. It is not within the province of the divorce court to exercise the powers sought by the respondent. If any criminal law is being violated, the matter should be processed by the proper authorities. Courts can not be involved until proper charges are processed and filed.

The constitutional issues were decided adversely to respondent's contentions in Buchholz v. Buchholz, 197 Neb. 180, 248 N. W. 2d 21 (1976). We specifically held the Nebraska divorce laws are not unconstitutional under the due process of equal protection clauses of the United States and Nebraska Constitutions. Reference to that case will answer all questions raised by the respondent.

Respondent's appeal borders on the frivolous. Her contentions merit little discussion. It is sufficient to say the record discloses a reasonable effort to effect reconciliation has been made and it is obvious the petitioner has no desire to continue the marriage relationship. The evidence clearly supports the trial court's finding, the marriage was irretrievably broken. As stated in Mathias v. Mathias, 194 Neb. 598, 234 N. W. 2d 212 (1975): "When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together the marriage is irretrievably broken."

The judgment of the District Court is affirmed.

AFFIRMED.

THE STATE OF NEBRASKA, ss.

I, Larry D. Donelson, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by said Court on the 8th day of March, 1978 with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 26th day of June, 1978.

Larry D. Donelson
Clerk
By John D. Cariotto
Deputy

APPENDIX "B"

ORDER DENYING REHEARING IN THE SUPREME COURT OF NEBRASKA

Robert D. Roberts,)
Appellee,)
v.)
Betty J. Roberts,)
Appellant.)

Appeal from the District Court for Lancaster County. No. 41392.

Finding no probable error in the prior judgment of this court herein, the motion of appellant is overruled and a rehearing herein is denied.

SUPREME COURT)
) ss.
STATE OF NEBRASKA)

I, LARRY D. DONELSON, Clerk of the Supreme Court of the State of Nebraska, do certify that I have compared the foregoing copy of Journal Entry dated April 24, 1978, in the case of Roberts vs. Roberts No. 41392, with the original now on file in my office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 28th day of June, 1978.

(SEAL)

Larry D. Donelson
Clerk

By John D. Cariotto
Deputy

APPENDIX "C"

Text of Nebraska "no fault" divorce law - §§ 42-347 to 379

(d) DIVORCE AND ANNULMENT ACTIONS

42-347. Terms, defined. As used in sections 42-347 to 42-379, unless the context otherwise requires:

(1) Dissolution of marriage shall mean the termination of a marriage by decree of a court of competent jurisdiction upon a finding that the marriage is irretrievably broken. After July 6, 1972, the term dissolution of marriage shall be considered synonymous with divorce, and whenever the term divorce appears in the statutes it shall mean dissolution of marriage pursuant to sections 42-347 to 42-379; and

(2) Legal separation shall mean a decree of a court of competent jurisdiction providing that two persons who have been legally married shall thereafter live separate and apart and providing for any necessary adjustment of property, support, and custody rights between the parties, but not dissolving the marriage.

42-348. District court; jurisdiction. All proceedings under sections 42-347 to 42-379 shall be brought in the district court of the county in which one of the parties reside. Proceedings may be transferred to a separate juvenile court which has acquired jurisdiction pursuant to section 43-230.

Source: Laws 1972, LB 820, § 2.

42-349. Dissolution; action; conditions. No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his permanent home for at least one year prior to the filing of the petition, or unless the marriage was solemnized in this state and either party has resided in this state from the time of marriage to filing the petition. Persons serving in the armed forces of the United States who have been continuously stationed at any military base or installation in this state for one year or, if the marriage was solemnized in this state, have

resided in this state from the time of marriage to the filing of the petition shall for the purposes of sections 42-347 to 42-379 be deemed residents of this state.

Source: Laws 1972, LB 820, § 3.

42-350. Legal separation; residence; provisions. If a petition for legal separation is filed before residence requirements for dissolution of marriage have been complied with either party, upon complying with such requirements, may amend his pleadings to request a dissolution of marriage, and notice of such amendment shall be given in the same manner as for an original action under sections 42-347 to 42-379.

Source: Laws 1972, LB 820, § 4.

42-351. District court; jurisdiction. In proceedings under sections 42-347 to 42-379, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorneys' fees.

Source: Laws 1972, LB 820, § 5.

42-352. Proceedings; petition; filing; service. A proceeding under sections 42-347 to 42-379 shall be commenced by filing a petition in the district court. Except when service is by publication, a copy of the petition, together with a copy of a summons, shall be served upon the other party to the marriage.

Source: Laws 1972, LB 820, § 6.

42-353. Petition; contents. The form of the petition and all other pleadings required by sections 42-347 to 42-379 shall be prescribed by the Supreme Court. The petition shall include the following:

(1) The name and address of petitioner and his attorney;

(2) The name and address, if known, of respondent;

(3) The date and place of marriage;

(4) The name and date of birth of each child whose custody or welfare may be affected by the proceedings;

(5) If the petitioner is a party to any other pending action for divorce, separation, or dissolution of marriage, a statement as to where such action is pending;

(6) A statement of the relief sought by petitioner, including adjustment of custody, property, and support rights; and

(7) An allegation that the marriage is irretrievably broken.

Source: Laws 1972, LB 820, § 7.

42-354. Responsive pleading; filing; service. A responsive pleading, if any, shall be filed and served upon the petitioner within thirty days of the date of service upon the respondent.

Source: Laws 1972, LB 820, § 8.

42-355. Service of process. No marriage shall be dissolved or legal separation decreed unless the respondent shall have (1) been personally served with process if within the state; (2) been served with personal notice duly proved and appearing of record if out of this state; (3) been served by publication as provided in section 25-519, after an order for publication has been signed and filed upon affidavit of petitioner or his attorney that respondent's whereabouts is unknown and could not be determined after reasonable and due inquiry and search for thirty days after filing the petition; or (4) entered an appearance in the case.

Source: Laws 1972, LB 820, § 9.

42-356. Hearings. Hearing shall be held in open court upon the oral testimony of witnesses or upon the depositions of such witnesses taken as in other actions. The court may in its discretion close the hearings and may restrict the availability of the evidence or bill of exceptions.

Source: Laws 1972, LB 820, § 10.

42-357. Temporary and ex parte orders. The court may order either party to pay to the clerk a sum of money for the temporary support and maintenance of the other party and minor children if any are affected by the action, and to enable such party to prosecute or defend the action. The court may make such order

after services of process and claim for temporary allowances is made in the petition or by motion by the petitioner or by the respondent in a responsive pleading; but no such order shall be entered until three clear days after notice of hearing has been served on the other party or notice waived. During the pendency of any proceeding under sections 42-347 to 42-379 after the petition is filed, upon application of either party the court may issue ex parte orders (1) restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of real or personal property except in the usual course of business or for the necessaries of life, and the party against whom such order is directed shall upon order of the court account for all unusual expenditures made after such order is served upon him; (2) enjoining any party from molesting or disturbing the peace of the other party; and (3) determining the temporary custody of any minor children of the marriage; *Provided,* ex parte orders issued pursuant to subdivision (1) of this section shall remain in force for no more than ten days or until a hearing is held thereon, whichever is earlier. After motion, notice to the party's attorney, and hearing, the court may order either party excluded from the family dwelling of the other upon a showing that physical or emotional harm would otherwise result.

Source: Laws 1972, LB 820, § 11.

42-358. Attorney for minor child. The court may appoint an attorney to protect the interests of any minor children of the parties. Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children. The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered, unless the court finds the party responsible is indigent and orders the county to pay.

Source: Laws 1972, LB 820, § 12.

42-359. Applications for support or alimony; financial statements. Applications for support or alimony shall be accompanied by a statement of the applicant's financial condition and, to the best of the applicant's knowledge, a statement of the other party's financial condition. Such other party may file his statement if he so desires, and shall do so if ordered by the court. Statements shall be under oath and shall show income from salary or other sources, assets, debts and payments thereon, living expenses, and other relevant information. Required forms for financial statements may be furnished by the court.

Source: Laws 1972, LB 820, § 13.

42-360. Reconciliation; transfer of action; when. No decree shall be entered under sections 42-347 to 42-379 unless the court finds that every reasonable effort to effect reconciliation has been made. Proceedings filed pursuant to sections 42-347 to 42-379 shall be subject to transfer to a conciliation court pursuant to section 42-822 or 42-823, in counties where such a court has been established. In counties having no conciliation court, the court hearing proceedings under sections 42-347 to 42-379 may refer the parties to qualified marriage counselors or family service agencies, or other persons or agencies determined by the court to be qualified to provide conciliation services, if the court finds that there appears to be some reasonable possibility of a reconciliation being effected.

Source: Laws 1972, LB 820, § 14.

It is only when there exists a reasonable possibility of reconciliation that the statutes require efforts be made to effect it. Condreay v. Condreay, 190 Neb. 513, 209 N. W. 2d 357.

42-361. Marriage irretrievably broken; findings. (1) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(2) If one of the parties has denied under oath or af-

firmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.

Source: Laws 1972, LB 820, § 15.

42-362. Spouse mentally ill; guardian ad litem; appointment; order for support. When the pleadings or evidence in any action pursuant to sections 42-347 to 42-379 indicate that either spouse is mentally ill, a guardian ad litem shall be appointed to represent his interests. Such guardian's fee, when allowed by the court, shall be taxed as costs, and shall be paid by the county if the parties are unable to do so. When a marriage is dissolved and the evidence indicates that either spouse is mentally ill, the court may, at the time of dissolving the marriage or at any time thereafter, make such order for the support and maintenance of such mentally ill person as it may deem necessary and proper, having due regard to the property and income of the parties, and the court may require the party ordered to provide support and maintenance to file a bond or otherwise give security for such support. Such an order for support may be entered upon the application of the guardian or guardian ad litem or of any person, county, municipality, or institution charged with the support of such mentally ill person. The order for support may if necessary, be revised from time to time on like application.

Source: Laws 1972, LB 820, § 16.

42-363. Waiting period. No decree dissolving a marriage shall be granted in any proceeding before six months shall have elapsed after service of process or after the last day of publication of notice or after the date that a voluntary appearance is filed with the clerk or after proceedings in the conciliation court are completed, but the court may waive the waiting period if it shall determine that conciliation efforts have failed.

Source: Laws 1972, LB 820, § 17.

42-364. Dissolution; decree; children; custody. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing.

Source: Laws 1972, LB 820, § 18.

42-365. Decree; alimony; determination; modification. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Reasonable security for payment may be required by the court. Except as to amounts accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but where alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.

Source: Laws 1972, LB 820, § 19.

42-366. Property settlements; effect. (1) To promote the amicable settlement of disputes between the parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written property settlement agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the support and custody of minor children.

(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the agreement, except

terms providing for the support and custody of minor children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable.

(3) If the court finds the agreement unconscionable, the court may request the parties to submit a revised agreement or the court may make orders for the disposition of property, support, and maintenance.

(4) If the court finds that the agreement is not unconscionable as to support, maintenance, and property: (a) Unless the agreement provides to the contrary, its terms may be set forth in the decree of dissolution or legal separation and the parties shall be ordered to perform them; or (b) if the agreement provides that its terms shall not be set forth in the decree, the decree shall identify the agreement and shall state that the court has found the terms not unconscionable, and the parties shall be ordered to perform them.

(5) Terms of the agreement set forth in the decree may be enforced by all remedies available for the enforcement of a judgment including contempt.

(6) Alimony may be ordered in addition to a property settlement award.

(7) Except for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree.

Source: Laws 1972, LB 820, § 20.

42-367. Temporary allowance; costs; payment. In every action for dissolution of marriage or legal separation, the court may require the husband to pay any sum necessary to enable the wife to maintain the action during its pendency. When dissolution of marriage or a legal separation is decreed, the court may decree costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.

Source: Laws 1972, LB 820, § 21.

42-368. Decree of separation; payment of support. When a legal separation is decreed, the court may order payment of such support by one party to the other as may be reasonable, having regard for the circumstances of the parties and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Orders for support may be modified or revoked for good cause shown upon notice and hearing, except as to amounts accrued prior to date of service of motion to modify, to which date modification may be retroactive.

Source: Laws 1972, LB 820, § 22.

42-369. Support or alimony payments; orders; filing; payments to clerk of the district court. All orders or judgments for temporary or permanent support payments or alimony shall direct the payment of such sums to the clerk of the district court for the use of the persons for whom the same have been awarded. Orders and judgments for temporary or permanent support or alimony shall be filed with the clerk, and have the force and effect of judgments when entered, and the clerk shall disburse all payments received as directed by the court. Records shall be kept of all funds received and disbursed by the clerk, which records shall be open to inspection by the parties and their attorneys.

Source: Laws 1972, LB 820, § 23.

42-370. Contempt proceedings; attorney fees; costs. Nothing in sections 42-347 to 42-379 shall prohibit a party from initiating contempt proceedings. Costs, including a reasonable attorney's fee, may be taxed against a party found to be in contempt.

Source: Laws 1972, LB 820, § 24.

42-371. Judgments, orders, payment of money; liens; release. (1) All judgments and orders for payment of money under sections 42-347 to 42-379 shall be liens upon property as in other actions and may be enforced or collected by execution and the means authorized for collection of money judgments. The judgment credi-

tor may execute a partial or total release of the judgment, generally or on specific property. Release of judgments for child support must be approved by the court which rendered the judgment.

(2) Child support judgments shall cease to be liens on property ten years from the date (a) the youngest child becomes of age or dies, or (b) the most recent execution was issued to collect the judgment, whichever is later, and such lien shall not be reinstated.

(3) Alimony and property settlement award judgments shall cease to be a lien on property ten years from the date (a) the judgment was entered, (b) the most recent payment was made, or (c) the most recent execution was issued to collect the judgment, whichever is latest, and such lien shall not be reinstated.

(4) Whenever a judgment creditor under sections 42-347 to 42-379 refuses to execute a release of the judgment as provided in this section, the person desiring such release may file an application for the relief desired. A copy of the application and a notice of hearing shall be served on the judgment creditor either personally or by registered or certified mail no less than ten days before the date of hearing. If the court finds that the release is not requested for the purpose of avoiding payment and that the release will not unduly reduce the security, the court may release property from the judgment lien. As a condition for such release, the court may require the posting of a bond with the clerk in an amount fixed by the court, guaranteeing payment of the judgment.

(5) The court may in any case, if it finds it necessary, order a person required to make payments under sections 42-347 to 42-379 to post sufficient security with the clerk to insure payment. Upon failure to comply with the order the court may also appoint a receiver to take charge of the debtor's property to insure payment.

Source: Laws 1972, LB 820, § 25.

42-372. Decree; when final. A decree dissolving a marriage shall not become final or operative until six months after the decree is rendered, except for the

purpose of review by appeal, and for such purpose only the decree shall be treated as a final order as soon as rendered. If an appeal is instituted within one month, such decree shall not become final until such proceedings are finally determined. If no such proceedings have been instituted, the court may, at any time within such six months, vacate or modify its decree. If such decree shall not have been vacated or modified, unless proceedings are then pending with that end in view, the original decree shall at the expiration of six months become final without any further action of the court.

Source: Laws 1972, LB 820, § 26.

42-373. Annulments; procedure. Actions for annulment of a marriage shall be brought in the same manner as actions for dissolution of marriage, and shall be subject to all applicable provisions of sections 42-347 to 42-379 pertaining to dissolution of marriage, except that the only residence requirement shall be that petitioner be an actual resident of the county in which the petition is filed.

Source: Laws 1972, LB 820, § 27.

42-374. Annulments; conditions. A marriage may be annulled for any of the following causes:

(1) Where the marriage between the parties is prohibited by law;

(2) Where either party is impotent at the time of marriage;

(3) Where either party had a spouse living at the time of marriage;

(4) Where either party was mentally ill or a mental retardate at the time of marriage; or

(5) Force or fraud.

Source: Laws 1972, LB 820, § 28.

42-375. Annulments; persons under disability; action by parent or next friend; voidable marriage; denial, when. Annulment actions on behalf of persons under disability may be brought by a parent or adult next friend. An annulment may not be decreed if the marriage is found to be voidable and the parties freely

cohabited after the ground for annulment has terminated or become known to the innocent party.

Source: Laws 1972, LB 820, § 29.

42-376. Doubted marriage; procedure. When validity of a marriage is doubted, either party may file a petition and the court shall decree it annulled or affirmed according to the proof. Notice shall be given the other party as in the case of a petition for dissolutions of marriage.

Source: Laws 1972, LB 820, § 30.

42-377. Legitimacy of children. Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-379, shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown.

Source: Laws 1972, LB 820, § 31.

42-378. Nullity of marriage; procedure. When the court finds that a party entered into the contract of marriage in good faith supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree and the court may order such innocent party compensated as in the case of dissolution of marriage, including an award for costs and attorney fees.

Source: Laws 1972, LB 820, § 32.

42-379. Pending actions; applicability of act. (1) Sections 42-347 to 42-379 shall apply to all proceedings commenced on or after July 6, 1972.

(2) Sections 42-347 to 42-379 shall apply to all pending actions and proceedings commenced prior to July 6, 1972 with respect to issues on which a judgment has not been entered. Pending actions for divorce or separation shall be deemed to have been commenced on the basis of irretrievable breakdown. Evidence adduced after July 6, 1972 shall be in compliance with sections 42-347 to 42-379.

(3) Sections 42-347 to 42-379 shall apply to all pro-

ceedings commenced after their effective date for the modification of a judgment or order entered prior to July 6, 1972.

(4) In any action or proceeding in which an appeal was pending or a new trial was ordered prior to July 6, 1972, the law in effect at the time of the order sustaining the appeal or the new trial shall govern the appeal, the new trial, and any subsequent trial or appeal.

Source: Laws 1972, LB 820, § 33.

78-101

IN THE SUPREME COURT OF NEBRASKA

ROBERT D. ROBERTS,	)	No. 41392
	)	
Appellee,	)	NOTICE OF APPEAL
	)	AND NOTICE OF
vs.	)	INTENTION TO FILE
	)	PETITION FOR WRIT OF
BETTY J. ROBERTS,	)	CERTIORARI TO THE
	)	SUPREME COURT OF
Appellant.	)	THE UNITED STATES

Comes now BETTY J. ROBERTS, Appellant, by and through her attorney, and hereby gives notice of appeal and notice of intention to file petition for writ of certiorari with the Supreme Court of the United States, all with respect to the Court's judgment entered on March 8, 1978 and denial of rehearing entered on April 24, 1978.

BETTY J. ROBERTS,
Appellant

By Richard Douglas McClain,
her Attorney
3705 South Street
Lincoln, Nebraska 68506
489-1394

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a copy of the foregoing upon all other counsel herein by depositing the same in the United States mail, first class postage prepaid, duly addressed thereto or by delivering the same in person thereto or at the office thereof on July 13, 1978.

Richard Douglas McClain

Filed with the Supreme Court of Nebraska
on July 13, 1978